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Issue Date: 04 December 2002

In the Matter of

BRUCE W. CHRISTENSEN,
Claimant

Case Nos. 2000-LHC-02200
2000-LHC-02201

v.

OWCP Nos. 14-125052
14-130265

STEVEDORING SERVICES OF AMERICA,
Employer

and

HOMEPORT INSURANCE CO.,
Carrier

Charles Robinowitz, Esq.
Portland, Oregon
For the Claimant

John Dudrey, Esq.
Portland, Oregon
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER¹

This claim is for compensation for permanent partial and permanent total disability arising under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter “the Act”). A formal hearing was held on November 28, 2001, in Portland, Oregon. Claimant’s Exhibits 1 through 21 and 23 through 39, and Employer’s Exhibits 1 through 35, were admitted into evidence at the hearing (TR 13-14).²

¹ The following abbreviations will be used when citing to the record in this case:
EX - Employer’s Exhibit; CX - Claimant’s Exhibit; and TR - Hearing Transcript.

² Claimant’s Exhibit 22 was withdrawn (TR 17-18).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant is 54 years of age and married with two children. He lives in the North Bend/Coos Bay area of Oregon. He has worked as a longshoreman since 1966 (CX 30, at 135).

Claimant injured his back while working for Employer on April 19, 1997. His average weekly wage at the time of this injury was \$1,576.72 (TR 5; *Claimant's Closing Argument* (hereinafter "Claimant's Brief"), at 1). He was out of work from April 20, 1997 until August 11, 1997, and received compensation for temporary total disability during that period at the maximum rate at that time of \$801.06 (TR 5; *Stevedoring Services of America's Post-Hearing Memorandum* (hereinafter "Employer's Brief"), at 2). He returned to work on August 12, 1997 (Employer's Brief, at 2). On January 7, 1998, he reached maximum medical improvement. The parties agree that Claimant is entitled to compensation for temporary partial disability from August 7, 1997 to January 7, 1998 in the amount of \$215.89 per week (Employer's Brief, at 2-3). The parties also agree that Claimant is entitled to compensation for permanent partial disability commencing January 8, 1998, at the rate of \$320.41 per week (TR 7-8; Claimant's Brief, at 2).

Claimant injured his back again on April 9, 1999, while working for employer (TR 9; Claimant's Brief, at 1). He reached maximum medical improvement on June 21, 2000 (TR 9). He has not returned to work since April 9, 1999. The parties agree that he is entitled to compensation for temporary total disability from April 10, 1999, through June 21, 2000, and compensation for permanent total disability thereafter (TR 9; Employer's Brief, at 3).

Claimant contends to have some psychological problems related to his back injuries and has been seeing Dr. Charles Reagan, a psychiatrist, for treatment. Employer agreed to accept responsibility for Claimant's psychological problems and agreed to pay for Claimant's treatment with Dr. Reagan "and any other reasonable and necessary charges related to his psychological condition." (TR 7, Employer's Brief, at 2).

There are two issues in this case. First, in determining the amount of Claimant's compensation for permanent partial disability, should Claimant's average weekly wage for his second injury be based on his earnings in the 52 weeks prior to his second injury, or should it be based on his wage-earning capacity following his first accident (the residual wage-earning capacity)? Second, should Claimant's concurrent payments for permanent partial and permanent total disability be subject to the maximum compensation rate set forth in §6(b)(1) of the Act?

Average Weekly Wage

Both the Claimant and Employer agree that Claimant is entitled to compensation for permanent total disability and that Claimant's average weekly wage based on his earnings for the 52 weeks prior to his second injury was \$1,140.59 (TR 9). However, Employer argues that Claimant's average weekly wage for his second injury should be based on his residual wage-earning capacity following his first injury rather than his earnings in the year prior to the second injury (TR 10; Employer's Brief, at 4).

Determination of a claimant's average weekly wage is governed by §10 of the Act, which states:

Except as otherwise provided in this chapter, the average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation

(Emphasis added).

Although §10 states clearly that the “average weekly wage . . . at the time of the injury shall be taken as the basis upon which to compute compensation”, Employer argues that Claimant's average weekly wage for his second injury should be his residual wage-earning capacity following his first accident, which was \$1,096.11. In support of its argument, Employer contends that Claimant's residual wage-earning capacity following the first injury is “the most reliable information” concerning his earning capacity,” but does not explain why it is the most reliable. Employer also cites to several cases in support of using Claimant's residual wage-earning capacity (Employer's Brief, at 5-8), but the cases fail to support Employer's contentions.

One of the cases cited by Employer is *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). In *Finch*, the Benefits Review Board stated the following:

Although, as employer contends, the Board has recognized that double recovery may be prevented by adjusting claimant's average weekly wage-earning capacity of the second injury to correspond with his residual wage-earning capacity following the first injury, *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in part and rev'd and rem. in part on other grounds*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984), both the Board and the United States Court of Appeals for the D.C. Circuit have also recognized that the second award should be based on claimant's average weekly wage “at the time of the second injury”

Finch, 22 BRBS at 200.

In *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995) the Ninth Circuit refused to use claimant's residual wage-earning capacity and instead found that the claimant's actual earnings during the 52 weeks prior to his second injury best reflect his wage-earning capacity and was the most reliable information. 58 F.3d at 421, 29 BRBS at 102. Employer argued that the facts in this case differ from those in *Brady-Hamilton* and that Claimant's residual wage-earning capacity is the “most reliable information.” (Employer's Brief, at 7-8). I disagree. The facts in *Brady-Hamilton* are very similar to this case. In both cases, an employee suffered two injuries, was receiving permanent partial disability for the first injury, and became totally disabled following the second injury. The Ninth Circuit affirmed the ALJ's determination of the claimant's average weekly wage which was calculated based on his earnings in the year prior to his second injury. *Id.*

Employer also argues that Claimant's average weekly wage should be based on his residual wage-earning capacity because the concurrent payments of permanent partial disability

and permanent total disability will be more than the maximum rate of compensation allowed in §6(b)(1) of the Act (Employer's Brief, at 5). This argument has no merit, for even if Claimant's residual wage-earning capacity following his first injury was used as his average weekly wage, the concurrent payments would still be more than the maximum compensation rate in §6(b)(1).

Employer's final argument in support of using Claimant's residual wage-earning capacity is that there was a wage increase of 3.9% that went into effect on June 28, 1997 (Employer's Brief, at 8). This argument also has no merit. The employer in *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), also advanced this argument and the Board rejected it, stating that:

As it is undisputed that claimant's increase in wages prior to the second injury is the result of a general increase in wage rates and not an increase in his earning capacity . . . the administrative law judge's decision to use claimant's actual earnings prior to the 1984 [second] injury to calculate his average weekly wage is thus affirmed as it is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe [v. Smith, Hinchman & Grylls Associates, Inc.]*, 380 U.S. [359] at 360 [1965].

Nelson, supra, at 29 BRBS 95.

I find that Claimant's average weekly wage for his second injury must be based on his earnings in the year prior to that injury, as §10 dictates. In this case, the parties agree that his average weekly wage based on his earnings in the 52 weeks prior to the second injury equals \$1,140.59. Accordingly, Claimant's compensation rate for temporary total disability and permanent total disability for his second injury is \$760.39.³

Concurrent Awards

Claimant has been receiving \$320.41 per week in compensation for permanent partial disability since January 7, 1998. Once he begins receiving compensation for his second injury, he will be receiving concurrent awards. There is no dispute that the case law provides for concurrent awards. See *Hastings v. Earth Satellite Corporation*, 628 F.2d 85 (D.C. Cir.), cert. denied, 449 U.S. 905, 101 S.Ct. 281 (1980); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, *supra*; *Brady-Hamilton, supra*; *Nelson, supra*; *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). But, there is a dispute about whether his concurrent awards can exceed the maximum rate of compensation set forth in §6(b)(1) of the Act.

Claimant argues that: (1) the statutory language in §6(b)(1) does not limit the amount a claimant may receive for concurrent awards; and (2) the Ninth Circuit in *Brady-Hamilton* suggested that no adjustment of concurrent awards is necessary when a claimant's increase in wages is due to a contract wage increase and not an increase in claimant's wage earning capacity (Claimant's Brief, at 5). On the other hand, Employer argues that the maximum rate of

³ Sections 8(a) and (b) of the Act state that a claimant's award should be two-thirds of his average weekly wage.

compensation set forth in §6(b)(1) of the Act applies to concurrent awards and Claimant's compensation should be decreased so as not to exceed that limit (Employer's Brief, at 12).

First, Claimant's argument that the decision in *Brady-Hamilton* suggested no adjustment is necessary to concurrent awards when the claimant's increased wages are due to a contract wage increase is inapposite to this case, where claimant's average weekly wage in the year before the second injury was lower than it was for the first injury.

The courts have been upholding concurrent awards for a long time, but it was not until relatively recently that the courts considered whether concurrent awards can exceed the statutory maximum rate of compensation. The cases that have decided the issue hold that the combined awards cannot exceed the maximum rate of compensation set forth in §8(a). See *Brady-Hamilton, supra.*; *Hansen v. Container Stevedoring Company*, BRB Nos. 97-0873 and 97-0873A, 1997 WL 692215 (DOL BRB) (1997); *Padilla, supra.*; *Price v. Stevedoring Services of America*, BRB Nos. 01-0632 and 01-0632A, 2002 WL 937752 (DOL BRB) (2002). In this case, the parties dispute whether concurrent awards are limited to the maximum rate of compensation set forth in §6(b)(1), not §8(a). Despite the fact that the parties focus on the limit set forth in §6(b)(1), I feel a discussion of why the limit set forth in §8(a) is not appropriate in this case is necessary.

Section 8(a) of the Act limits permanent total disability benefits to two-thirds of the claimant's average weekly wage at the time of the injury. In a case such as this one, if the concurrent awards for permanent partial disability and permanent total disability are limited to two-thirds of Claimant's average weekly wage at the time of the second injury, he would not be fully compensated because his average weekly wage at the time of his second injury was reduced due to his loss of wage-earning capacity following the first injury. As stated in *Hastings*, "[b]ecause compensation for his original loss of earning capacity was already addressed in the permanent-partial award, logic and fairness require that the permanent-partial disability award continue concurrently with the permanent-total award" and "paying the two awards concurrently . . . compensates him fully." 628 F.2d at 91. Since limiting the concurrent awards to two-thirds of claimant's average weekly wage for the second injury will not fully compensate Claimant, §8(a) does not apply to limit Claimant's concurrent awards.

Both parties cited a recent decision by the Benefits Review Board, *Price v. Stevedoring Services of America*, BRB Nos. 01-0632 and 01-0632A, 2002 WL 937752 (DOL BRB) (2002), as potentially affecting the outcome of this case. In *Price*, the claimant was receiving compensation for permanent partial disability from a 1979 injury when he sustained a totally disabling injury to his back in 1998. The Board awarded compensation for permanent total disability based on the claimant's average weekly wage at the time of the 1998 injury, but awarded the carrier for the 1998 injury a credit for the amount that the concurrent awards exceeded the maximum compensation rate set forth in §8(a). Although *Price* seems to have some resemblance to this claim, I hold that it is not apposite. First, the employer is relying on §6(b), not §8(a), in arguing that the claimant's concurrent awards here exceed the statutory maximum. Second, and of great import, the claimant's average weekly wage in *Price* was higher for the second injury than for the first, whereas here the opposite is true.

Section 6(b)(1) limits a claimant's "compensation for disability ..." to 200 percent of the applicable national average weekly wage.⁴ Claimant argues that §6(b)(1) does not apply to concurrent awards, and that if it was intended to apply to more than one disability it would state "compensation for one or more disabilities." (Claimant's Closing Argument, at 5). I do not find this argument convincing. For one thing, the word "disability" is defined in §2(10) of the Act as "incapacity because of injury ...," not "incapacity because of *an* injury." Thus, as used in the Act, "disability" may encompass more than one injury, and it would be inconsistent to interpret "disability" in §6(b)(1) to apply to only a single injury. Moreover, there is no logical reason for subjecting workers who incur a loss of wage-earning capacity due to a single injury to a limitation on their compensation but not subjecting workers incurring an identical loss of wage-earning capacity due to more than one injury to that limitation. If Claimant had become totally disabled from the first injury, §6(b)(1) would have limited his compensation to 200 percent of the national average weekly wage. If Claimant had become totally disabled solely due to the second accident, his compensation likewise would have been limited to 200 percent of the national average weekly wage. There is no logical reason why this limitation on the amount of compensation Claimant may receive should not apply simply because claimant's compensation arises from two separate injuries.

Claimant is currently receiving \$320.41 per week as compensation for permanent partial disability from his first injury. As stated earlier, Claimant is entitled to compensation for temporary total and permanent total disability for his second injury in the amount of \$760.39 per week. His concurrent awards total \$1080.80. Based on §6(b)(1), the maximum compensation Claimant can receive is 200 percent of the national average weekly wage; therefore Employer is entitled to a credit for the amount which exceeds 200 percent of the national average weekly wage. However, Claimant is entitled to the annual increases in compensation for permanent total

disability in accordance with §10(f) of the Act. Therefore, Claimant is entitled to the maximum rate of compensation set forth in §6(b)(1), and Employer is entitled to a credit of the amount which exceeds the maximum rate of compensation set forth in §6(b)(1).

ORDER

Based on the foregoing, ***IT IS ORDERED*** that:

1. The Employer shall pay to the Claimant:

⁴For the periods applicable to this case, 200% of the National Average Weekly wage was \$871.76 from October 1, 1998 through September 30, 1999; \$901.28 from October 1, 1999 through September 30, 2000; \$933.82 from October 1, 2000 through September 30, 2001; \$966.08 from October 1, 2001 through September 30, 2002; and \$996.54 beginning on October 1, 2002.

- a) Compensation for temporary partial disability from August 7, 1997 to January 7, 1998, in the amount of \$215.89 per week;
- b) Compensation for permanent partial disability commencing January 8, 1998, at the rate of \$320.41 per week;
- c) Compensation for temporary total disability in the amount of \$760.39 per week from April 10, 1999, to September 30, 1999;
- d) Compensation for permanent total disability in the amount of \$760.39 per week, commencing June 22, 2000, subject to the increases provided in §10(f) of the Act;

Provided, however, that claimant's total compensation for any week shall not exceed 200% of the applicable national average weekly wage.

- 2. Employer shall pay interest on all payments of compensation from the dates due until paid in accordance with 28 U.S.C. 1961(a).
- 2. Employer shall pay medical benefits to the Claimant including the treatment provided by Dr. Charles Reagan.
- 3. Employer shall be entitled to credit for all previous payments of compensation and medical benefits.
- 4. Claimant's counsel shall have 30 days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

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JEFFREY TURECK
Administrative Law Judge